No. 350673-III

COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON

Anne Marshall (Monoskie), Appellant

v.

Phillip ("Cliff") Monoskie, Respondent

REPLY BRIEF OF MS. MARSHALL

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I. REPLY POINTS AS THEY APPEAR IN RESPONSE

Anne Marshall will, in this section, Reply to the response brief of Cliff Monoskie as the points appear in his Response, and in Part II, she will summarize the substance of her Reply.

A. Court's Authority to Make a Decision Without Remand

Mr. Monoskie denies that the appellate court can make a decision on determined facts without a remand (Response at p.1, point B).

However, a remand is only necessary if new findings of fact must be made. *State v. Hall*, 32 Wash. App. 108, 109–10, 645 P.2d 1143, 1145 (1982). As the court said in *Fed. Way Sch. Dist. 210 v. Vinson:*

> Because the error of law is dispositive of the appeal, there is no need to remand.

Fed. Way Sch. Dist. 210 v. Vinson, 154 Wash. App. 220, 231, 225 P.3d 379, 386 (2010), *rev'd* (on other grounds) *sub nom. Fed. Way Sch. Dist. No. 210 v. Vinson,* 172 Wash. 2d 756, 261 P.3d 145 (2011). Also see *In re Marriage of Himes*, 136 Wash. 2d 707, 735, 965 P.2d 1087, 1101 (1998) ("no need to remand for a factual inquiry…"). And see *In re Marriage of Morris,* 176 Wash. App. 893, 908, 309 P.3d 767, 775 (2013)("There is no need to remand for specific findings in this case").

In this case, the trial judge was clear that she wanted to place all the children with Anne Marshall, but felt that she could not under current legal authority. This error of law is what is being appealed.

B. Timing of Notices of Relocation

On page 2, Mr. Monoskie's factual summary omits a key point that Anne Marshall had given Cliff Monoskie notice of her intention to relocate back to Washington State in January of 2015. (See CP: 32, citing admitted trial exhibit P-55). Only when Anne began following through on her notice, to move herself and her son nearer to her daughters, did Mr. Monoskie provide his Notice of Relocation. Cliff Monoskie's notice then led to Ms. Marshall's Objection to Relocation and Petition for Modification, filed on June 1, 2015 (CP: 1-10). Ms. Marshall's Petition also referenced RCW 26.09.260 factors (CP: 6-7), as well as RCW 26.09.520 factors.

Mr. Monoskie filed his Objection to Relocation (an objection to Ms. Marshall moving closer to him) on June 12, 2015, citing only RCW 26.09.520 factors (CP: 16-24).

C. Trial Court's Error of Law

Mr. Monoskie's cites the trial court's findings and ruling at length on page 3 of his Response, and that citation includes the error of law of the trial court that is on appeal here: That is that the court wants to put all the

children together (with Anne), but the trial court believed it lacked the legal authority to do so. That error of law is the basis of this appeal, and it is summarized in Mr. Monoskie's excerpt of the Ruling in his Response.

D. Anne Marshall Was the Parent to Receive All Five Children

It is extremely disingenuous of Cliff Monoskie to imply that it is not obvious that the trial court meant to place all the children with Anne Marshall, "but for" its view that it lacked legal authority.

The court placed the youngest child (C.M.) with Anne based upon the RCW 26.09.187 parenting plan factors, per the prior orders, and did so in a decision that was without any presumption to overcome. The court placed C.M. with Anne based upon factors that included Cliff's bad judgment and failure to facilitate the children's relationship with the mother. Clerk's Papers pages 155-158 make this obvious, as does the Oral Ruling generally. (CP: 49-95.)

This argument by Mr. Monoskie – that it is unclear with which parent the trial judge wished to place all children -- is simply not honest.

The trial court put C.M. with Ms. Marshall as part of a non-relocation (non-presumption) decision under RCW 26.09.187, and so the only possible logical meaning of putting "all five children together" is to placing them all with Anne Marshall. This conclusion is reinforced by

Cliff Monoskie's detrimental behavior that is included in the findings of the trial court. (CP: 155-158 & 49-95.)

E. Cliff Monoskie's Behaviors ARE Detrimental to the Children

Mr. Monoskie next, on pages 6-7 of his Response, denies that the bad behaviors in which he was found to have engaged are "detriments" to the children. This, too, seems disingenuous, as words normally have their ordinary meaning:

> The goal of statutory interpretation is to carry out the legislature's intent. *Burns,* 161 Wash.2d at 140, 164 P.3d 475. If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words. *Id.*

Tesoro Ref. & Mktg. Co. v. State, Dep't of Revenue, 164 Wash. 2d 310, 317, 190 P.3d 28, 32 (2008). And see for the same proposition, *Miller v. City of Pasco*, 50 Wash. 2d 229, 232, 310 P.2d 863, 865 (1957), citing *Pacific Northwest Alloys v. State*, 49 Wash.2d 702, 306 P.2d 197 (1957).

The ordinary meaning of "detriment" is:

> loss, damage, disadvantage, or injury.

http://www.dictionary.com/browse/detriment.

The behavior of Cliff Monoskie is certainly damaging and injurious to the children, and his attack on their relationship with their mother is a disadvantage and loss to the children.

Further, apart from the detriment to the children of Mr. Monoskie's behavior, the trial court is clear that it is detrimental to the children to not be living together.

F. Separate Proceeding versus Distinct Statutory Basis in the Same Proceeding

Anne Marshall has shown the court that she filed a Petition to Modify under RCW 26.09.260, as well as her Objection to Relocation under RCW 26.09.405 through 26.09.560 (trial under an objection is on the factors under section .520). (CP: 6-7.)

Cliff Monoskie, on page 9 of his Response, makes the flat legal error of stating that "If a party requests a major modification under RCW 26.09.260, the matter cannot proceed to trial without a finding of adequate cause." This is simply wrong. This legal error is sustained by Mr. Monoskie throughout his Response, especially at pages 9-11 of the Response.

In contrast to Mr. Monoskie's position, on its face, RCW 26.09.260(6) reads:

> (6) The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. The person objecting to the relocation of the child or the relocating person's proposed revised residential schedule may file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, without a showing of adequate cause other

> than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued. In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in RCW 26.09.405 through 26.09.560. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

This aspect of RCW 26.09.260 was explicitly addressed in *In re Marriage of Grigsby.* Once the mother lost her relocation trial, she immediately withdrew her request for relocation, and the trial court nonetheless proceeded on the father's request to modify. The *Grigsby* appellate court said that the trial court lost authority to modify once the relocation was withdrawn:

> The statute provides that a hearing to determine whether there is adequate cause for the modification is not required "so long as the relocation is being pursued." Had the Legislature indicated that a showing of adequate cause is not required after relocation is *proposed,* for example, the trial court's modification of the parenting plan here would have been proper. But the normal requirement of a showing of adequate cause is excused only so long as relocation is being *pursued.* Where, as here, the parent is no longer pursuing relocation, the parent proposing modification of the parenting plan must show a substantial change in circumstances, considering the factors set forth in RCW 26.09.260(2).

In re Marriage of Grigsby, 112 Wash. App. 1, 16, 57 P.3d 1166, 1173 (2002) (emphasis in the original).

Application of *In re Marriage of Grigsby:* Obviously, in the Monoskie case, both relocations continued to be pursued, and the court did not need any additional adequate cause to apply RCW 26.09.260(1)&(2).

This point was made even more clear in *McDevitt v. Davis* in which Division III upheld Judge Cozza modifying the parenting plan in a relocation, which was done before the mother withdrew her pursuit of relocation, and the *McDevitt* court distinguished the *Grisby* result on its facts (while applying the law of *Grigsby*):

> [In *Grigsby*] Division One of this court reversed the parenting plan modification, concluding that the previously emphasized language of the third sentence ("so long as the relocation is being pursued") precluded the modification of the parenting plan once the mother withdrew her request. *Id.* at 16–17, 57 P.3d 1166. Having followed the same procedure as the mother in *Grigsby,* Ms. McDevitt understandably believes that the same outcome should result here.[3] However, there are two significant factual differences between this case and that one.
>
> The biggest difference is the fact that unlike the mother in *Grigsby,* Ms. McDevitt actually did relocate while the motion was pending. Judge Cozza here was thus dealing with an accomplished relocation rather than an anticipated one. It also was the second relocation Ms. McDevitt had made since the dissolution had commenced. Under these circumstances, we think the trial court properly could act upon the actual factual circumstances before it rather than on the anticipated future conduct of Ms. McDevitt.
>
> The other significant difference is that unlike *Grigsby,* here the trial court had ruled on the parenting plan modification before Ms, McDevitt acted to withdraw her request to relocate. Allowing Ms. McDevitt to withdraw her request at that stage essentially gave her veto power over a decision she did not like. A parent, rather than the trial judge, then would be the one who decided what was in the current best interests of the children.

> Such an outcome is contrary to the legislative intent of the parenting plan statute.

McDevitt v. Davis, 181 Wash. App. 765, 772–73, 326 P.3d 865, 869 (2014) (footnotes omitted), *review denied* 181 Wash.2d 1018 (Nov. 05, 2014).

Application of *McDevitt v. Davis:* Both *McDevitt* factual differences, distinct from the facts of *Grigsby*, apply here: (1) Cliff Monoskie had relocated before trial, and (2) the trial court ruled "before" either party withdrew their pursuit of relocation (in fact, both parents did relocate). The court obviously retained power to modify under RCW 26.09.260.

In sum, a "different proceeding" is not necessary to apply both RCW 26.09.520 and .260 factors.

G. Reconsideration as Additional Evidence

In the reconsideration, post-trial behavior of Cliff Monoskie showed that he continued the same detrimental behavior that should have led the trial court to place all the children with Anne Marshall. (CP: 189-196.) This behavior, being post-trial, was obviously not previously available under CR 59(a)(4), and the court proceeded under legal errors here on appeal (CR 59(a)(7)), and substantial justice was not done for the children, as well as for Anne. CR 59(a)(9).

It is worth remembering that there are two significant detriments to the children for the court to consider: (a) The detriment in Cliff's home from Cliff Monoskie's behavior, and (b) the detriment to the children of living apart. The trial court appeared to believe that it could not rely upon both versions of detriment to overcome the presumption in favor of Mr. Monoskie's relocation of the girls.

II. Conclusion and Relief Requested

While the trial court expressed displeasure with Cliff and Anne for placing the children in separate households, if Mr. Monoskie had been as cooperative as Ms. Marshall in facilitating the relationships of the children with each other and with the other parent, the decision would not necessarily have been problematic.

The essence of the appellate decision was summarized in the introductory quotes in Anne Marshall's Opening Brief:

> "I think it goes without question that what I'd like to do is put all five of these children together." (Oral Ruling of 10/28/16 at CP:72, lines 16-18. The Oral Ruling of 10/28/16 was incorporated into the Findings of Fact in final orders at CP: 153 and CP: 154.)
>
> "This is one of the reasons why I asked both attorneys to brief this issue. I really was hoping that there was some legal authority or some way for me to put these children back together. I don't believe I have that authority, even based upon the briefing provided by these attorneys… I am constrained by the statute." (Ruling of 10/28/16 at CP:73, lines 15-23.)

"Turning from the *Marriage of Horner* to *In re Parentage of R.F.R.*, the ultimate decision still rests upon 'an overall consideration of the best interests of the child' (emphasis added):

> The parental relocation act governs the trial court's decision on whether to allow a parent with primary custody to relocate his or her child. *See* RCW 26.09.405–.560. Under the act, courts have the authority to allow or disallow relocation based on an overall consideration of the best interests of the child. *In re Marriage of Grigsby,* 112 Wash.App. 1, 7, 57 P.3d 1166 (2002).

In re Parentage of R.F.R., 122 Wash. App. 324, 328, 93 P.3d 951, 954 (2004)." (Petitioner's Post-Trial Memorandum on Relocation, CP: 26-27, with entire Memorandum at CP 25-39.)

The foregoing quotes distill the essence of the appellate decision to be made on this appeal.

As has already been cited to the court, the best interests of the children still matter in a relocation decision (emphasis added):

> After the hearing, the trial court has authority "to allow or not allow a person to relocate the child" based on an overall consideration of the RCW 26.09.520 factors and the child's best interests. RCW 26.09.420; *In re Parentage of R.F.R.,* 122 Wash.App. 324, 328, 93 P.3d 951 (2004); *In re Marriage of Grigsby,* 112 Wash.App. 1, 7–8, 57 P.3d 1166 (2002).

In re Marriage of Wehr, 165 Wash. App. 610, 612, 267 P.3d 1045, 1046–47 (2011) (published in part – quote from published portion), and *Wehr* was citing *Grisby*, which states, in relevant part:

> In a modification action the presumption is in favor of "custodial" continuity, not environmental stability or environmental continuity. It is only where the nonprimary residential parent overcomes that presumption by showing continued placement with the other parent is not in the child's best interest that the principal residence of the child may be changed.[6]

> The Relocation Act of 2000 reflects a disagreement with the rationale of these cases and gives courts the authority to allow or disallow relocation based on the best interests of the child.

In re Marriage of Grigsby, 112 Wash. App. 1, 6–7, 57 P.3d 1166, 1169 (2002) (emphasis added, footnotes omitted).

There is detriment to the children in the father's home; there is detriment to the children in living apart from each other; there is a clear finding of the trial court that all the children's best interests would be served by living with the mother, Anne Marshall.

The detriment of living apart from the siblings applies to the three boys, as well, who live with Anne.

It is legal error to assume that the case law forces the trial court to violate its clear judgment, based in substantial evidence, of the best interests of the children.

Placing all the children with Anne Marshall is respectfully requested under relocation law and under the law of modification of parenting plans.

Respectfully submitted on 7/23/17.

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No. 350673-III

COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON

Anne Monoskie (Marshall),	)	DECLARATION OF SERVICE
	)	RE: Reply Brief
Appellant,	)	of Ms. Marshall
and	)	
Phillip (Cliff) Monoskie,	)	
Respondent.	)	

I certify that on the 23rd day of July, 2017, I caused a true and correct copy of Appellant's Reply Brief to be served on the following in the manner indicated below:

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Signed and Sworn on the date above.

Lori Mason, paralegal for Craig Mason

CERTIFICATE OF SERVICE

MASON LAW

July 23, 2017 - 9:18 PM

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